Kerajaan Malaysia v Wong Pot Heng & Anor

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01–15–1992
CHONG SIEW FAI CJ (SABAH & SARAWAK), PEH SWEE CHIN AND MOHD DZAIDDIN FCJJ
18 DECEMBER 1996

Statutory Interpretation — *Subordinate legislation — Retrospective effect of amendments to subsidiary legislation — Absence of power in parent Act for delegated authority to legislate retrospectively — Whether any subsidiary legislation could be made with retrospective effect notwithstanding the absence of power expressly given by the parent Act — Whether s 20 of the Interpretation Acts 1948 and 1967 dispensed with the need for such express power in the parent Act — Emergency (Essential Powers) Act 1979 s 2 — Essential (Protection of Depositors) (Amendment) Regulations 1991 regs 4 & 5 — Essential (Protection of Depositors) Regulations 1986 regs 9B & 13(2) — Interpretation Acts 1948 and 1967 s 20*

Emergency Legislation — *Validity — Regulations, invalid — Whether s 2 of the Emergency (Essential Powers) Act 1979 conferred express power to the delegated authority to legislate retrospectively — No necessity for implied power to legislate retrospectively — Whether Essential (Protection of Depositors) (Amendment) Regulations 1991 could be made with retrospective effect — Emergency (Essential Powers) Act 1979 s 2 — Essential (Protection of Depositors) (Amendment) Regulations 1991 regs 4 & 5 — Essential (Protection of Depositors) Regulations 1986 regs 9(1)(c), 9B & 13(2)*

The respondents were the plaintiffs and the appellant was the defendant in the court below. Both the plaintiffs were the employees of the Co-operative Central Bank Ltd ('CCB') at all material times. The first plaintiff obtained an award for RM424,428.81 in the Industrial Court in connection with his wrongful dismissal by CCB. Similarly, the second plaintiff obtained a judgment for RM425,412.50 against CCB from the High Court in connection with the termination of his service by the CCB.

As a result of CCB's financial collapse and as a rescue operation for its depositors, the Central Bank under reg 9(1)(c) of the Essential (Protection of Depositors) Regulations 1986 ('the Regulations of 1986') applied to the High Court for the appointment of two receivers to manage the affairs and properties of CCB. The Regulations of 1986 was made under the Emergency (Essential Powers) Act 1979 ('the parent Act'). The receivers applied to the High Court for an order of priority of payment by CCB to various persons. The High Court determined that the plaintiffs, for priority purpose, would be paid after (i) costs, charges and expenses; and (ii) depositors. The plaintiffs then appealed and the (then) Supreme Court held that the plaintiffs should rank equally with the depositors. The Central Bank subsequently applied to the High Court that the sum of RM523m injected into CCB by the Central Bank should be classified under the category of 'costs, charges and expenses' under reg 13 of Regulations of 1986. The High Court dismissed the application.

After the aforesaid application, the Yang di-Pertuan Agong made an amendment to the Regulations of 1986 vide the Essential (Protection of Depositors) (Amendment) Regulations 1991 ('the Regulations of 1991'). A

Fearing that the Regulations of 1991 might invalidate the award obtained by the first plaintiff and the judgment obtained by the second plaintiff, both plaintiffs filed an originating summons against the defendant claiming that: (i) the Regulations of 1991 was ultra vires and void; and/or (ii) the Regulations of 1991 did not in any event invalidate such judgment or award obtained by them. The court below found in two parts: (i) regs 9B and 13(2) inserted by the Regulations of 1991 were ultra vires and void because they were made retrospectively; and (ii) the Regulations of 1991, whether intra vires or ultra vires the parent Act, would not or did not affect such accrued rights from the Supreme Court's judgment and the Industrial Court's award in question. B C

The learned judge came to the conclusion that the aforesaid regs 9B and 13(2) inserted by the Regulations of 1991 were invalid in so far as they purported to operate retrospectively because the delegated authority under the parent Act for making the regulations in question, viz the Yang di-Pertuan Agong, was not given the power under s 2 of the parent Act to make them with retrospective effect. D E

This appeal proceeded against part (i) of the finding, ie that regs 9B and 13(2) inserted by the Regulations of 1991 were ultra vires and void. The issue was whether any subsidiary legislation could be made with retrospective effect notwithstanding the absence of power expressly given by the parent Act. In this connection, s 20 of the Interpretation Acts 1948 and 1967 ('the Interpretation Acts') which allowed subsidiary legislation to be made to operate retrospectively to any date which was not earlier than the commencement of the parent Act had been argued as dispensing with the need for such express power in the parent Act. F G

Held, dismissing the appeal with costs:

(1) A subsidiary legislation could only be made with retrospective operation if it was authorized by an express power in, or by necessary implication from, its parent Act (see p 450E); *McEldowney v Forde* [1971] AC 632, *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, *Phillips v Eyre* (1870) LR 6 QB 1, *Dr Indramani v WR Nathan & Ors* [1963] 1 SCR 721 and *Union of India v Madan Gopal Kabra* (1954) 5 SCR 541 followed. H

(2) Section 2 of the parent Act was the enabling section for the Regulations of 1986 and the Regulations of 1991. It did not confer any express power to the delegated authority, ie the Yang di-Pertuan Agong, to legislate retrospectively. Although the brief description of the parent Act might render it possible that there might be some implied power to the delegated authority to I

legislate retrospectively, such implication of such power was not necessary on the facts and circumstances in this case. Also, power from any subsidiary legislation could never rise above that in its parent Act (see p 450G–I); *A-G v Gold Storage (Singapore) Pte Ltd* [1979] 1 MLJ 277 not followed.

(3) Section 20 of the Interpretation Acts merely permitted the making of retrospective subsidiary legislation, but the source of such power for making it must come from a valid, competent source, eg statute of the legislature. If no such power was given, the delegated authority was not entitled to legislate retrospectively (see p 451C–D); *Blue Metal Industries Ltd & Anor v RW Dilley & Anor* [1970] AC 827 followed.

[Bahasa Malaysia summary

Penentang-penentang adalah plaintif dan perayu adalah defendan di mahkamah bawah. Kedua-dua plaintif adalah pekerja Co-operative Central Bank Ltd ('CCB') pada semua masa material. Plaintif pertama telah memperolehi suatu award untuk RM424,428.81 di Mahkamah Perusahaan berkaitan dengan pemecatan salah oleh CCB. Plaintif kedua juga telah memperolehi penghakiman untuk RM425,412.50 terhadap CCB daripada Mahkamah Tinggi berkaitan dengan pemberhentian perkhidmatannya oleh CCB.

Akibat keruntuhan kewangan CCB dan sebagai satu operasi penyelamat untuk para penyimpan, Bank Negara telah memohon kepada Mahkamah Tinggi untuk pelantikan dua penerima bagi mengurus hal dan harta CCB di bawah peraturan 9(1)(c) Peraturan-Peraturan Perlu (Perlindungan Penyimpan) 1986 ('Peraturan 1986'). Peraturan 1986 telah dibuat di bawah Akta Darurat (Kuasa-Kuasa Perlu) 1979 ('Akta induk tersebut'). Penerima-penerima telah memohon kepada Mahkamah Tinggi untuk suatu perintah bayaran keutamaan oleh CCB kepada beberapa orang. Mahkamah Tinggi memutuskan bahawa plaintif-plaintif, untuk tujuan keutamaan, patut dibayar selepas: (i) kos, caj dan perbelanjaan; dan (ii) penyimpan. Plaintif-plaintif kemudian merayu dan Mahkamah Agung (pada masa itu) memutuskan bahawa plaintif-plaintif haruslah dianggap setaraf dengan penyimpan. Bank Negara kemudiannya memohon kepada Mahkamah Tinggi agar jumlah RM523 juta yang dimasukkan dalam CCB oleh Bank Negara dikelaskan di bawah kategori 'kos, caj dan perbelanjaan' di bawah peraturan 13 Peraturan 1986. Mahkamah Tinggi menolak rayuan.

Selepas permohonan tersebut, Yang di-Pertuan Agong telah membuat pindaan kepada Peraturan 1986 melalui Peraturan-Peraturan Perlu (Perlindungan Penyimpan) (Pindaan) 1991 ('Peraturan 1991').

Oleh kerana plaintif-plaintif khuatir bahawa Peraturan 1991 mungkin mentaksahkan award yang diperolehi oleh plaintif pertama dan penghakiman yang diperolehi oleh plaintif kedua, kedua-dua

mereka memfailkan saman pemula terhadap defendan yang menuntut bahawa: (i) Peraturan 1991 adalah ultra vires dan tak sah; dan/atau (ii) Peraturan 1991 tidak dalam apa keadaan pun mentaksahkan penghakiman atau award demikian yang diperolehi oleh mereka. Mahkamah bawah memutuskan dalam dua bahagian: (i) peraturan-peraturan 9B dan 13(2) yang dimasukkan oleh Peraturan 1991 adalah ultra vires dan tak sah sebab mereka telah dibuat secara kebelakangan; dan (ii) Peraturan 1991, sama ada intra vires atau ultra vires Akta induk tersebut, tidak akan atau tidak menjejaskan hak terakru demikian daripada penghakiman Mahkamah Agung dan award Mahkamah Perusahaan yang berkenaan.

Hakim yang arif mencapai kesimpulan bahawa peraturan-peraturan 9B dan 13(2) yang dimasukkan oleh Peraturan 1991 adalah tidak sah sejauh mana mereka dikatakan berfungsi secara kebelakangan sebab pihak berkuasa yang ditugaskan di bawah Akta induk tersebut untuk membuat peraturan-peraturan yang berkenaan, iaitu Yang di-Pertuan Agong, tidak diberi kuasa di bawah s 2 Akta induk tersebut untuk membuatnya dengan kesan kebelakangan.

Rayuan ini telah diteruskan terhadap bahagian (i) pendapat mahkamah, iaitu bahawa peraturan-peraturan 9B dan 13(2) yang dimasukkan oleh Peraturan 1991 adalah ultra vires dan tak sah. Isu yang harus dipertimbangkan adalah sama ada perundangan subsidiari boleh dibuat dengan kesan kebelakangan meskipun dalam ketiadaan kuasa yang diberikan secara nyata oleh Akta induk tersebut. Dalam kaitan ini, s 20 Akta Tafsiran 1948 dan 1967 ('Akta Tafsiran') yang membenarkan perundangan subsidiari dibuat supaya beroperasi secara kebelakangan kepada mana-mana tarikh yang tidak lebih awal daripada permulaan Akta induk tersebut telah dihujahkan sebagai mengetepikan keperluan untuk kuasa nyata demikian dalam Akta induk tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Perundangan subsidiari hanya boleh dibuat dengan kesan kebelakangan jika ia dibenarkan oleh suatu kuasa nyata dalam, atau melalui implikasi yang dikehendaki daripada, Akta induk tersebut (lihat ms 450E); *McEldowney v Forde* [1971] AC 632, *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, *Phillips v Eyre* (1870) LR 6 QB 1, *Dr Indramani v WR Nathan & Ors* [1963] 1 SCR 721 dan *Union of India v Madan Gopal Kabra* (1954) 5 SCR 541 diikut.

(2) Seksyen 2 Akta induk tersebut merupakan seksyen yang membolehkan Peraturan 1986 dan Peraturan 1991 dikuatkuasakan. Ia tidak mengurniakan apa-apa kuasa nyata kepada pihak berkuasa yang ditugaskan, yakni Yang di-Pertuan Agong, untuk menggubal secara kebelakangan. Walaupun gambaran ringkas Akta induk tersebut boleh menyebabkan kemungkinan terdapatnya kuasa tersirat kepada pihak berkuasa yang ditugaskan untuk menggubal secara kebelakangan, implikasi

kuasa demikian tidak perlu atas fakta dan keadaan dalam kes ini. Juga, kuasa daripada sebarang perundangan subsidiari tidak boleh mengatasi Akta induknya (lihat ms 450G–I); *A-G v Gold Storage (Singapore) Pte Ltd* [1979] 1 MLJ 277 tidak diikut.

(3) Seksyen 20 Akta Tafsiran hanya membenarkan pembuatan perundangan subsidiari kebelakangan, tetapi sumber kuasa demikian untuk membuatnya mestilah berasal daripada suatu sumber yang sah dan kompeten, misalnya statut perundangan. Jika tiada kuasa demikian telah diberikan, pihak berkuasa yang ditugaskan tidak berhak menggubal secara kebelakangan (lihat ms 451C–D); *Blue Metal Industries Ltd & Anor v RW Dilley & Anor* [1970] AC 827 diikut.]

Notes

For a case on retrospective effect of amendments to subsidiary legislation, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) para 1643.

For a case on validity of emergency legislation, see 6 *Mallal's Digest* (4th Ed, 1992) para 1643.

Cases referred to

A-G v Gold Storage (Singapore) Pte Ltd [1979] 1 MLJ 277 (not folld)
Blue Metal Industries Ltd & Anor v RW Dilley & Anor [1970] AC 827 (folld)
Broadcasting Co of Australia Pty Ltd & Ors v Commonwealth (1935) 52 CLR 52 (refd)
Dr Indramani v WR Nathan & Ors [1963] 1 SCR 721 (folld)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187 (folld)
McEldowney v Forde [1971] AC 632 (folld)
Phillips v Eyre (1870) LR 6 QB 1 (folld)
Union of India v Madan Gopal Kabra (1954) 5 SCR 541 (folld)
Wong Pot Heng & Anor v Kerajaan Malaysia [1992] 2 MLJ 885 (refd)

Legislation referred to

Emergency (Essential Powers) Act 1979 s 2
Essential (Protection of Depositors) Regulations 1986 regs 9(1)(c), 9B, 13(2)
Essential (Protection of Depositors) (Amendment) Regulations 1991 regs 4, 5
Interpretation Acts 1948 and 1967 ss 20, 23(1), 25

Appeal from: Originating Summons No R1–24–69 of 1991 (High Court, Kuala Lumpur)

Ahmad Zaki bin Hj Husin and *Aktar Tahir* (Senior Federal Counsel, Attorney-General's Chambers) for the appellant.

VK Lingam, *Peter Kay Raj*, *Satchithanandhan* and *Adam bin Bachek* (*VK Lingam & Co*) for the respondents.

Cur Adv Vult A

Peh Swee Chin FCJ (delivering the judgment of the court): Many material facts and much history leading to this appeal before us have been marshalled with clarity in the judgment of the court below (see [1992] 2 MLJ 885). We will only refer to such facts very briefly and only when B necessary in order to avoid wholesale repetition.This written judgment is predicated by having set a very short but very important principle at rest; the principle being whether any subsidiary legislation can be made with retrospective effect notwithstanding the absence of power expressly given by the parent Act. In this connection, s 20 of the Interpretation Acts 1948 and 1967 (Act 388) ('the Interpretation Acts') has been argued with C vigour as dispensing with the need for such express power. We will consider this section later.

The respondents are the plaintiffs and the appellant, the defendant. Both plaintiffs were employees of the Co-operative Central Bank Ltd ('CCB') at all material times. The first plaintiff obtained an award for D RM424,428.81 in the Industrial Court, being Award No 32/89 in connection with his wrongful dismissal by CCB and similarly, the second plaintiff obtained a judgment for RM425,412.50 also against CCB from Kuala Lumpur High Court in connection with the termination of his service by CCB.

E

As a result of CCB's financial collapse and as a rescue operation for its depositors, the Central Bank of Malaysia ('the Central Bank'), more popularly known as 'Bank Negara Malaysia', under reg 9(1)(c) of the Essential (Protection of Depositors) Regulations 1986 ('the Regulations of 1986') applied to the High Court for the appointment of two receivers to manage the affairs and property of CCB. The receivers applied to the High F Court for an order of priority of payment by CCB to various persons. It is to be remembered that CCB has been at all material times, a deposit taker, ie it could take the deposits of money like a commercial bank.

The High Court determined that the plaintiffs herein, for priority purpose, would be paid after: (i) costs, charges and expenses; and G (ii) depositors. The plaintiffs herein appealed and the Supreme Court held that the plaintiffs herein, who were also the plaintiffs therein, 'should rank equally' with the depositors. The Central Bank subsequently applied to the court that the sum of RM523m injected into CCB by the Central Bank should be classified under the category of 'costs, charges and expenses' under reg 13 of the Regulations of 1986, the money from the Central Bank H was apparently meant for depositors of CCB who were in dire straits. The same High Court dismissed the application. Regulation 13 of the Regulations of 1986 is set out below:

> 13 Costs
>
> All proper costs, charges and expenses, including remuneration, of receivers and other persons appointed under these Regulations shall be payable out of the assets of the deposit-taker in priority to all other claims. I

A After the aforesaid application, the Yang di-Pertuan Agong made amendments to the Regulations of 1986 by regulations known as the 'Essential (Protection of Depositors) (Amendment) Regulations 1991' ('the Regulations of 1991'). It is to be remembered that the Regulations of 1986 and the Regulations of 1991 were made under the Emergency (Essential Powers) Act 1979 ('the parent Act').

B Fearing that the Regulations of 1991 might invalidate the award obtained by the first plaintiff and also the judgment obtained by the second plaintiff, both plaintiffs once again went to court by originating summons herein citing the Malaysian Government as defendant claiming that: (i) the Regulations of 1991 were ultra vires and void and/or; (ii) the C Regulations of 1991 did not (in any event) invalidate such judgment or award aforesaid. The court below found, in effect or to the effect, in two parts: (i) that regs 9B and 13(2) inserted by the Regulations of 1991 were ultra vires and void because they were made retrospectively (therefore they could not affect the plaintiffs); and (ii) that the Regulations of 1991, D whether intra vires or ultra vires the parent Act, would not or did not affect such accrued rights from the Supreme Court's judgment and the Industrial Court's award in question. The said originating summons was, in the event that had turned out, strongly resisted or defended, thus justifying the fear of the plaintiffs.

E At the commencement of the hearing, the defendant abandoned all the grounds of appeal relating to part (ii) of the finding of the court below, but the appeal proceeded against part (i) of the finding, ie that regs 9B and 13(2) inserted by the Regulations of 1991 were ultra vires and void. The judgment of the court will be confined to the relevant submission and reasons on part (i) of the finding of the court below.

F The plaintiffs had sought, inter alia, before the court below for a declaration that the Regulations of 1991 be declared ultra vires and void and in granting it, the learned judge only found it relevant to consider, out of the Regulations of 1991, reg 4 — which inserted reg 9B(1)(f), reg 9B(2) and reg 13(2) — and reg 5(2). They are, perforce, set out below:

G 4(1) The principal Regulations are amended by inserting after reg 9 the following new regulations ... and 9B:

'9B(1) Subject to these Regulations, a manager may take all actions as may be necessary in relation to the business, affairs and property of the deposit-taker, or for the H purpose of protecting the interests of the depositors, creditors or customers, or persons having any lawful dealings or transactions with the deposit-taker, and, without prejudice to the generality of such power, the manager may, in particular, do all or any of the following:

(f) apply the assets of the deposit-taker which are at I any time in his possession, or under his custody or control, during the course of carrying on the business of the deposit-taker or the management

of the affairs and property of the deposit-taker, subject to reg 13, to meet the deposit liabilities of the deposit-taker in preference to all other unsecured liabilities of the deposit-taker.'

4(2) The new reg 9B introduced into the principal Regulations by para (1) shall be deemed to have come into force on the date of the commencement of the principal Regulations, save that in its application to s 31B of the Central Bank of Malaysia Ordinance 1958, it shall be deemed to have come into force as from the date of commencement of the said s 31B, that is, 1 January 1988.

5(1) Regulation 13 of the principal Regulations is amended by renumbering it as '13 (1)' and inserting thereafter a new para (2) as follows:

'13(2) The proper costs, charges and expenses referred to in para (1) shall include the following, regardless whether the same were paid personally by the receivers or the other persons referred to in para (1) (hereinafter in this regulation referred to as 'other persons'), or were paid by such receivers or other persons out of the assets of the deposit-taker, on behalf of the deposit-taker:

(a) the remuneration (including any contributions to any employees provident fund established by, under, or by virtue of, any written law) of all persons employed by the deposit-taker, or by the receivers or the other persons, for the purpose of the business and affairs of the deposit-taker, or for the purpose of the performance of the functions, the discharge of the duties, or the exercise of the powers of the receivers or the other persons;'

(2) Paragraph (1) shall be deemed to have come into force on the date of the commencement of the principle Regulations, and, accordingly, reg 13 of the principal Regulations as amended by para (1) shall be deemed to have been an integral part of the principal Regulations as from the date.

It will be realized from the order appealed from that the objection is in effect directed against reg 9B(2) (inserted by reg 4(2) of the Regulations of 1991) and reg 13(2) (inserted by reg 5(2) of the Regulations of 1991) of the Regulations of 1986; the former makes the new reg 9B (the subject matter of this appeal) come into force retrospectively on the date of the commencement of the Regulations of 1986, ie 23 July 1986; while the latter makes reg 13(2) (another subject matter of this appeal) similarly retrospective in operation from the same date of 23 July 1986.

This retrospective operation of the regulations in the order appealed from lies in the heart of this appeal. More about it later.

The learned judge came to the conclusion that the aforesaid regs 9B and 13(2) inserted the Regulations of 1991 were invalid in so far as they purported to operate retrospectively because the delegated authority under the parent Act for making the regulations in question, viz the Yang di-Pertuan Agong, was not given power to make them with retrospective

effect under the relevant part of the parent Act, viz its s 2, the relevant parts of which are set out below:

> 2 (1) *Subject to the provisions of this section*, the Yang di-Pertuan Agong may make any regulations whatsoever (in this Act referred to as 'Essential Regulations') which he considers desirable or expedient for securing the public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community. [Emphasis added.]
>
> (2) Without prejudice to the generality of the powers conferred by the preceding subsection, Essential Regulations may, so far as appear to the Yang di-Pertuan Agong to be necessary or expedient for any of the purposes mentioned in that subsection —
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> ...
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> (j) provide for amending any written law, for suspending the operation of any written law and for applying any written law with or without modification;
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> ...
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> (3) Essential Regulations may provide for empowering such authorities, persons or classes of persons as may be specified in the regulations to make orders, rules and by-laws for any of the purposes for which such regulations are authorised by this Act to be made, and may contain such incidental and supplementary provisions as appear to the Yang di-Pertuan Agong to be necessary or expedient for the purposes of the regulations.
>
> (4) An Essential Regulation, and any order, rule, or by-law duly made in pursuance of such a regulation shall have effect notwithstanding anything inconsistent therewith contained in any written law, including the Constitution or the Constitution of any State, other than this Act or in any instrument having effect by virtue of any written law other than this Act.

The court below referred correctly, with respect, to the plenary power of Parliament to legislate retrospectively subject to any restriction in the Federal Constitution and to a citizen seeking redress on account of any subsidiary legislation.

On reference by any citizen who is aggrieved by any subsidiary or delegated or subordinate legislation, his Lordship referred to the 'threefold task' stated by Lord Diplock in *McEldowney v Forde* [1971] AC 632 at p 658 in approaching such a reference, ie:

> Where the validity of subordinate legislation made pursuant to powers delegated by an Act of Parliament to a subordinate authority is challenged, the court has a threefold task: first, to determine the meaning of the words used in the Act of Parliament itself to describe the subordinate legislation which that authority is authorized to make, secondly, to determine the meaning of the subordinate legislation itself and finally to decide whether the subordinate legislation complies with that description.

After considering all the submissions, his Lordship came to the finding as stated above.

Let us look at the 'threefold task' in connection with the parent Act and the Regulations of 1991 below. A

Looking at the parent Act, as the first part of such a threefold task, we find that the parent Act was enacted to deal with certain grave and sudden situations requiring immediate actions or solutions. In view of the brevity of the parent Act, consisting of only six pages in contemplation of such a variety of grave situations aforesaid, the parent Act in our view, is deemed to confer, large and comprehensible powers to the Yang di-Pertuan Agong, who is undoubtedly the most prestigious delegated authority for making any subordinate, or delegated or subsidiary legislation, the three separate words of 'subordinate', 'delegated' and 'subsidiary' incidentally all mean the same thing, all begin attributive to 'legislation'. The relevant part of s 2 of the parent Act is para (j) of sub-s 2 thereof as set out above, the other paragraphs referring to other specific matters not relevant to the instant appeal. About the second part of the said threefold task, the function of the Regulations of 1991 is clear, they were made with hindsight to effect necessary changes in details to adapt them to earlier unforeseen contingencies in experience rapidly gained so far; see Prof Jain's *Administration Law of Malaysia and Singapore* (2nd Ed, 1989) at p 38 about factors leading to the growth of subsidiary legislation. Such function aforesaid, suffice it to say, is one of the normal functions of subsidiary legislation. Regulations 9B and 13(2) inserted by the Regulations of 1991 were enacted to fulfill this function. B C D E

The last part of the threefold task is of course the controversy in this case as to whether regs 9B and 13(2) comply with s 2 of the parent Act, ie whether they are within the scope of the section, and if they are not, they are ultra vires the said s 2. For this, some discussion is necessary about the pros and cons that follow before one draws a conclusion. F

Any subsidiary legislation is in effect a transfer of power from Parliament to some other authority, eg from the administration with the executive authority of Malaysia vested in the Cabinet, down to any local authority. In order to protect the authority, dignity and standing of Parliament and at the same time, the man in the street, safeguards for such subsidiary legislation are essential and courts are part of such safeguards. G

Parliament has plenary powers to make laws including retrospective law. If any authority is required at all for the proposition, see *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187. This is, of course, subject to any express restriction in the Federal Constitution. H

Now s 2(2)(j) of the parent Act has given the said delegated authority the power of 'amending any written law', for suspending the operation of any written law, or for 'applying any written law with or without modification'; see the said para (j) set out above. By making the operation of regs 9B and 13(2) inserted by the Regulations of 1991 retrospective to 23 July 1986, it may seem very much to be an act of 'amending any written law ...'. Coupled with this, it has been urged both here and below that s 20 of the Interpretation Acts provided support for the validity of the Regulations in question. The said s 20 is set out below: I

A 20 Subsidiary legislation may be made to operate retrospectively to any date which is not earlier than the commencement of the Act or other written law under which it is made or, where different provisions of that law come into operation on different dates, the commencement of that law under which it is made:

Provided that no person shall be made or shall become liable to
B any penalty in respect of any act done before the date on which the subsidiary legislation was published.

His Lordship has held in the court below that the said s 20 would be irrelevant in the absence of such express power to the delegated authority to legislate retrospectively.

C This s 20 is crucial but more will be said about this later, as we discuss further other relevant aspects or the pros and cons of the matter.

Thus, concern for some material aspect of the retrospective law was expressed archetypally by Willes J in *Phillips v Eyre* (1870) LR 6 QB 1 at p 23:

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> Retrospective laws are, no doubt, prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.

E Such concern stated above, though in different wording and phraseology, including the description of delegated authority functioning in effect as or like a mini Parliament, runs through the cases in relation to the presumption against retrospective operation of any statute in the absence of any express contrary intention. It is unnecessary to cite a multitude of such cases
F which are not directly on the point in question here apart from expressing such similar concern which must be borne in mind while one considers the absence of express power to a delegated authority to legislate retrospectively.

Now s 2 of the parent Act has not expressly conferred power on the delegated authority to make the regulations in question, but one begins to wonder whether the same s 2 has, by necessary implication, conferred such
G power because of the shortness of the parent Act, the said para (j) saying about amending 'any law', and the grave and sudden situations occasioning such parent Act in the first place. More about this later.

An overview in Malaysia on such a point can be found in *Administrative Law of Malaysia and Singapore* by Prof MP Jain (2nd Ed, 1989) at p 93 as
H follows:

> The courts do at times imply certain restrictions on the general power to make subsidiary legislation. One such implied restriction is that regulations should not have retrospective effect unless the parent Act expressly or by necessary implication confers a power to that effect. Parliament can enact
I laws with retrospective effect, but a subordinate legislator has to act within the limits of the power delegated to him, and a mere general power to make regulations does not empower him to make regulations with retrospective effect. The reason for this rule is that retrospective legislation disturbs vested rights of the people, and this only the legislature should do.

Such similar overview in Britain can also be found in 44 *Halsbury's Laws* (4th Ed) at p 636, para 1004 in connection with interpretation of subsidiary legislation as set out below:

> *Other matters affecting operation.* Since, if validly made, subordinate legislation has the same force and effect as a statute, little remains to be said with respect to its operation. However, it may be mentioned that, whereas the question whether it is intended to have retrospective effect is to be answered by the application of principles identical with those by which the question is determined in relation to statutes, the question whether it is capable of having such an effect depends upon the scope of the enabling power.

In Malaysia, the case under appeal seems to be the first reported case, directly on the point and in Singapore there is also one such case, ie *A-G v Gold Storage (Singapore) Pte Ltd* [1979] 1 MLJ 277, which held the view contrary to that in the case in the court below and concerned herein.

In the Singapore case, s 28(1) of the Port of Singapore Authority Act (Cap 73) first exempts premises vested in the Port of Singapore Authority from the operation of Municipal Ordinance and Local Government Ordinance 1957 and the by-laws thereunder.

Section 28(2) of the same Act also makes provision for application of the said Ordinance to such premises in the manner described therein by means of subsidiary legislation in the form of publication in the *Gazette* of a declaration or order by the relevant Minister.

The relevant Minister published on 19 March 1977 such a declaration which, to quote, 'shall be deemed to come into operation on 28 October 1976'. The respondent, the aggrieved corporate citizen, filed an originating summons for a declaration from the court that it was ultra vires the Act aforesaid.

Section 28(2) aforesaid is set out below:

> The Minister may, after consultation with the Authority, by order published in the Gazette declare that any other provisions of the said Ordinances and by-laws or of any written law repealing or re-enacting the provisions thereof, shall apply to the premises of the Authority, and thereupon the same shall apply accordingly.

The High Court in Singapore held, inter alia, that the terms of s 28(2) did not enable the declaration in question to be made with retrospective effect (the case in the High Court was unreported). On appeal to the Court of Appeal, Singapore, inter alia, with regard to the question of retrospective operation of the Minister's declaration, the High Court's decision on this point was overruled by reference to s 23 of the Interpretation Act (Singapore), thus (at p 277):

> Section 23(1) of the Interpretation Act provides that subsidiary legislation made under any Act or other lawful authority, unless it be otherwise provided in such subsidiary legislation, shall take effect and come into operation on the date of its publication in the *Gazette*. Subsection (2) of

A s 23 provides that any such subsidiary legislation may be made to operate retrospectively to any date not being a date earlier than the commencement of the Act or the establishment of the authority by or under which such subsidiary legislation is made.

Section 23 mentioned above appears to be similar or the same in substance B to s 20 of our own Interpretation Acts set out above. Re-reading it, the proviso to s 20 above can be ignored for the purpose of the present appeal as it relates to criminal offences.

We will reserve our further comments on this s 20 of the Interpretation Acts while we attempt a very brief survey of the cases directly on the point in other common law jurisdictions.

C

There does not seem to be any decided English case (neither has any been cited to us) about such absence of express power to a delegated authority to legislate retrospectively and the consequent effect on such subsidiary legislation being made with retrospective effect notwithstanding the absence of such said express power.

D

The Australian case closest to but still not directly on the point in issue is *Broadcasting Co of Australia Pty Ltd & Ors v Commonwealth* (1935) 52 CLR 52. In this case, under s 10 of the Wireless Telegraphy Act 1905–1909, 'the Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted E to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act'.

By reg 3 of the regulations made under the Act on 7 August 1928, the postmaster general may deduct an amount not exceeding 5 pence from certain licence fees, and this regulation 'shall be deemed to have commenced F on 1 November 1927'. The High Court of Australia, while stressing that the validity of such regulations must depend on the precise term of the law conferring such power on the Governor-General, held that reg 3 was invalid on ground of interference with concerned rights and also on the ground that no purpose of the Act was carried out.

G Apparently, the High Court of Australia was not presented with an argument of the absence of such express power to legislate retrospectively being granted under the parent Act, ie the Wireless Telegraphy Act, to the Governor-General, so that it did not deal with it.

Such failure to deal with it is not considered amiss as all common law H jurisdictions practise the adversarial system where it is left to the parties in a given case to present their respective cases in the best manner as appears to them and not for the court to direct or dictate to them as to how to conduct their cases. A court would not descend into the arena of the parties except possibly in one of those situations where not to do so would defeat the rights of a party altogether and to cause a gross injustice to him.

I

Canadian cases cited in the court below did not deal directly with the point in question.

It is in India also like in Singapore, that the point was dealt with and decided directly, and in India, in favour of the argument that a delegated authority can only legislate retrospectively if it is authorized by the parent Act either expressly or by necessary implication to do so. A

One of the Indian Supreme Court cases cited to us is *Dr Indramani v WR Nathan & Ors* [1963] 1 SCR 721. In that case, under the relevant parent Act entitled Forward Contracts (Regulation) Act 1952, by its s 12(1), 'the Central Government may, either on a request in writing received by it ... from ... or if in its opinion it is expedient so to do make by-laws for all or any of the matters specified in s 11 ... '. The question arose whether a by-law with retrospective effect made under s 12 aforesaid was valid. The Indian Supreme Court after a review of cases in the High Court and Supreme Court, held that the Central Government had no power to make such a by-law with retrospective effect when s 12 aforesaid did not expressly confer that power. It was held that the Parliament could legislate retrospectively under the Constitution subject to its limitations, but the same could not be said in the case of the delegated authority (viz the Central Government) exercising a delegated power as the scope of such delegated power was not co-extensive with that of Parliament. The Indian Supreme Court case affirmed the same ratio decidendi which emerged in an earlier Indian Supreme Court case of *Union of India v Madan Gopal Kabra* (1954) 5 SCR 541. B C D

We are, after anxious consideration, of the view that any subsidiary legislation can only be made with retrospective operation if it is authorized by an express power in, or by necessary implication from, its parent Act. We agree, with respect, with the Indian Supreme Court's cases and also subscribe to the overview in Britain as well as in Malaysia from the two books mentioned above, which is amply supported by the overtones and undertones of judgments of those cases (though not directly on the point) in all common law jurisdictions dealing with the presumption against retrospective operation of statutes in the absence of a contrary intention in them. E F

Therefore, in the parent Act in the instant case, s 2 is the enabling section for the Regulations of 1986 and the Regulations of 1991. It does not confer any express power to the delegated authority, ie the Yang di-Pertuan Agong to legislate retrospectively. Though our brief description of the parent Act may make it possible that there may be some implied power to the delegated authority to legislate retrospectively, but such implication of such power is not a 'necessity', ie an essential one on the facts and circumstances in this case. G H

We are also of the opinion that our view is more consistent with the concept that power from any subsidiary legislation can never rise above that in its parent Act. We are inclined to this view notwithstanding the Singapore case cited above, which, with great respect, we do not propose to adopt. I

A We venture to give our reasons. An Interpretation Act is a statute, concerned, prima facie, with meanings of words used in statutes so that the same words can have uniform meanings as far as possible, particularly those words which occur frequently in the statutes, so that the same meanings need not be repeated in various statutes with much tedium. B Section 20 of our Interpretation Acts refers to such retrospective subsidiary legislation which 'may be made'. These three words give rise to some ambiguity. They may mean that if it is made to operate retrospectively, it is by itself and nothing else, in order perfectly. They may also mean that it may be made on a certain underlying premise but unexpressed, ie only when it is enabled by its parent Act to do so. We lean towards the latter C meaning. In a nutshell, s 20 with the limitation therein contained, merely permits the making of retrospective subsidiary legislation, but the source of such power for making it must come from a valid, competent source, eg statute of the legislature. If no such power is given, the delegated authority is not entitled to legislate retrospectively.

D That complete reliance on s 20 by itself may not be safe is illustrated in another way. Thus, eg ex facie, s 25 seems broadly to reinforce the said former meaning of the said three words. Section 25 is set out below:

> Subsidiary legislation shall be deemed to be made under all powers thereunto enabling, whether or not it purports to be made in exercise of any particular E power or powers.

But s 23(1) of the same Interpretation Acts on the other hand, seems to lend weight to the latter meaning of the said three words, and s 23(1) is set out below:

F > Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency.

We are finally fortified in the view we hold of s 20 of our Interpretation Acts by a dictum of Lord Morris of Borth-y-Gest who delivered the G unanimous judgment of the Privy Council on an appeal from Australia in *Blue Metal Industries Ltd & Anor v RW Dilley & Anor* [1970] AC 827 That complicated case concerned the language of s 185 of the Companies Act 1961 (NSW), in connection with the merger of companies through the compulsory acquisition or transfer of shares of one company to another. It H was sought, inter alia, to be argued for the appellant that the said s 185 applied to the transfer of shares in one company to *two other companies jointly*, and not only the transfer of shares to another company *alone* because, in the Interpretation Act 1897 (NSW) words in the singular would include the plural, and vice versa unless the contrary intention appeared, as in other similar provisions of the Interpretation Act of some I other countries.

The Privy Council held that s 185 of that Companies Act applied, on its language and the facts of the case, to the transfer of shares to another company alone. Lord Morris of Borth-y-Gest said at p 848, as follows:

> It would seem unlikely that the legislature would solely depend upon the provisions of the Interpretation Act if there was an intention to legislate with such important consequences as to give powers of compulsory acquisition not to a single acquiring company but to a group of companies. The Interpretation Act is a drafting convenience. It is not to be expected that it would be used so as to change the character of legislation. Acquisition of shares by two or more companies is not merely the plural of acquisition by one. It is quite a different kind of acquisition with different consequences. It would presuppose a different legislative policy.

We are of the view that the learned judge was right in his conclusion, and we have no good reason to interfere with his conclusion. We therefore dismiss the appeal with costs here and below.

Appeal dismissed.

Reported by Tee Boon Cheong